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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KERSH LAKE DRAINAGE DISTRICT, ET AL.....*Petitioners*

v. No. 595

A. J. JOHNSON .....*Respondent*

ON CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR REHEARING

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Petitioners respectfully request that the Court grant them a rehearing in this cause, and assign as the ground therefor the fact that the Court overlooked important considerations in reaching its conclusion that the decree of the United States District Court, ordering assessment and collection of taxes upon each tract of land in the district, was not *res adjudicata* when subsequently pleaded by the petitioners in the foreclosure suit in the Lincoln Chancery Court.

When the creditors of the district brought suit in the federal court for the purpose of obtaining a mandatory injunction to compel the commissioners to levy and collect taxes in order to pay the judgment of said court, the commissioners filed an answer asserting that they had been enjoined by a decree of the Lincoln Chancery Court from collecting any further taxes from the lands of numerous landowners within the district (R. 32). Nevertheless the federal court held that the creditors were entitled to the relief which they sought, and the court ordered that the assessments be levied and collected (R. 22). This Court now holds, however, that this decree of the federal court could not be pleaded as *res adjudicata* in the state court, for the reason that the defense raised by the commissioners in the federal court was personal to each landowner and therefore could not be pleaded for him by the commissioners. We respectfully submit that the undisputed facts contained in the record show conclusively that the defense was not personal to these landowners and was of such a character that the commissioners could and should have pleaded the defense for them.

In the consideration of this question it should be borne in mind that in Arkansas there is no personal liability on the part of the landowner for an improvement district assessment. The creditors must look to the lands alone for payment, and an action to foreclose the unpaid assessments is *in rem*. (*Snetzer* v. *Gregg*, 129 Ark. 542, 547). Hence this defense was certainly not personal to each landowner as an individual, as it ran with the land. It is extremely improbable that the very same persons who owned the lands in 1932, when the state court decree was

entered, still own these lands and benefit by the holding in this case.

Clearly the manner in which this particular defense originally arose had nothing of a personal character. Two of the landowners had filed suit in the Lincoln Chancery Court for the purpose of having the court adjudge that full payment of their assessments, without interest, was a complete satisfaction of the lien against their lands. None of the other one hundred landowners whose lands were released by the final decree appeared in court, nor does the record show that they even had knowledge of the suit. The court on its own motion required an auditor to ascertain on what lands the assessments had been paid in full, and thereupon it entered its decree enjoining the commissioners from collecting further assessments from those lands. (R. 8). It is hard to see how a defense could be less personal in character than one which originated through no action of the person claiming it and involved the assertion on his part of no effort whatever. Inasmuch as the landowners who did not appear must necessarily have been represented either by the two plaintiffs in the Fish case or by the court itself, it is evident that the defense is not so personal that it must be asserted by each landowner individually. It should be remembered that in this case the respondent Johnson alone is representing all the other landowners in pleading this defense. Thus there is no inherent reason why the commissioners are disabled from asserting the defense for the landowners.

If it be conceded that the defense is not personal in the sense that no one except the landowner himself can assert the defense, the remaining question to be determined is whether the commissioners of the district were proper

parties to plead the defense for the landowners. If their reasons for pleading the defense were equally as strong as those of the individual landowners, and if there was no conflict of interest which would prevent the commissioners from energetically seeking to establish the defense for the landowners, no reason can be seen why the commissioners should not undertake to represent the land owners.

It has been held by the Supreme Court of Arkansas that the district represents its taxpayers and should plead for them any defense which they may have. (See pages 20 and 25 of our original brief.) In the federal court the creditors of the district were parties plaintiff; so unless the defendant district and its commissioners were representing the landowners, there was no one for them to be representing. The situation is similar to that of an executor or administrator, who is held to represent the heirs in a contest with the creditors and to represent the creditors in a contest with the heirs.

In their official capacity, the commissioners certainly had reason vigorously to assert the fact that they had been enjoined by action of the Lincoln Chancery Court. Not to have urged this defense might have placed them in the position of being in contempt of the court which had enjoined them from proceeding further against the lands discharged by the state court decree. Apart from their official capacity, the commissioners as individuals had been relieved of taxes amounting to approximately $29,000 by the state court decree (our brief, p. 9); so their personal interest coincided exactly with their position as commissioners of the district.

Finally, if the commissioners had been successful in the federal court in their plea of the state court injunction, it is clear that the individual landowners would have been entitled to the protection afforded them by this successful defense, as the federal court would not then have ordered the collection of assessments from the lands released by the Fish decree. A similar situation existed in the state court in 1932, as the landowners now seek to take advantage of a decree which was entered without notice to them, but which was in their favor. Since the landowners would undoubtedly have benefited by a favorable holding in the federal court, the equitable principle embodied in the rule of mutuality of estoppel requires that they be bound by an adverse decision.

For the reasons set forth we earnestly urge that the defense of these landowners had not the personal character which would have prevented the commissioners from raising the defense for them. This being true, in view of the fact that the commissioners unsuccessfully asserted the defense in the federal court, we submit that the landowners should be foreclosed from again asserting the same defense in the state court.

Petitioners respectfully request that they be granted a rehearing and that upon such rehearing the decision of the Supreme Court of Arkansas be reversed.

Respectfully submitted,

GEORGE B. ROSE,

Attorney for Petitioners

CERTIFICATE

I, George B. Rose, counsel for petitioners, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

GEORGE B. ROSE.

SUPREME COURT OF THE UNITED STATES.

No. 595.—October Term, 1939.

Kersh Lake Drainage District of Jefferson, Lincoln and Desha Counties, Arkansas, et al., Petitioners,
vs.
A. J. Johnson.

On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[March 25, 1940.]

Mr. Justice Black delivered the opinion of the Court.

Kersh Lake Drainage District was organized, in 1912, under the general drainage law of Arkansas.[1] An assessment of the value of benefits to accrue to each of the tracts of land embraced in the District was duly made, upon the basis of which annual levies were extended against each tract. And the District issued interest bearing certificates of indebtedness in payment of construction work done for it by contract.

Respondent Johnson, a landowner in the District, brought suit against the District and its Commissioners in the Lincoln Chancery Court of the State of Arkansas in order to establish that he had fully paid the share of benefit taxes apportioned to his land and was therefore entitled under Arkansas law to have his land declared free from any further drainage tax liability. In 1931, that State court rendered its final decree to the effect that the lien of the District for such taxes had already been "fully satisfied and released", and enjoined further extension of drainage taxes against his lands. In 1932, the same State court rendered a like decree in favor of W. A. Fish and other named landowners of the District.

November 1, 1935, a judgment against the District was obtained by certificate holders in the Federal court for the Eastern District of Arkansas. The Circuit Court of Appeals affirmed.[2] To enforce their judgment, these creditors then instituted proceedings in the

[1] Acts of Ark. 1909, p. 829.
[2] 85 F. (2d) 643.

same Federal District Court, for mandatory injunction to require the appropriate County clerks to extend drainage benefit taxes for the District upon their tax books; to require County officials to collect these taxes; and to provide that "if any property owners fail to pay their drainage tax the defendant, Kersh Lake Drainage District and its Commissioners be required to institute suit for the collection of the delinquent taxes, and to prosecute the same with due diligence to a conclusion, and to see that the delinquent lands are sold promptly under the decree of foreclosure, ..." Answering, the District set up among other defenses that "a large number of tracts of land in the District have fully paid the entire value of assessed benefits against said lands and that said property owners obtained a decree in the Lincoln Chancery Court in the case of W. A. Fish, et al. v. Kersh Lake Drainage District on June 15, 1932, enjoining and restraining the Commissioners of the defendant District from levying or extending any tax against these lands, the assessed benefits of which have been fully paid."

The District Court decreed that a mandatory injunction issue compelling the "County clerks and County collectors to perform their duties in the collection of the drainage taxes upon the lands in suit"; that there be extended taxes "of six and one-half per cent of the benefits assessed against each tract of land . . . until the whole of the decree has been satisfied"; that the "Commissioners . . . be required to institute suits for the collection of all delinquent taxes of said District, and to prosecute the same forthwith to a conclusion, . . ."; and that "the said Commissioners are deemed receivers of this court . . . ." And the Circuit Court of Appeals affirmed.[3]

Pursuant to this mandatory injunction, the drainage taxes were extended on the tax books but respondent Johnson and other landowners in whose favor the decrees of the Lincoln Chancery Court had been rendered, refused to pay. Suit for collection was filed against their lands in the Lincoln Chancery Court by the Commissioners. In reliance upon the 1931 and 1932 State Chancery Court decrees as final determinations that the assessments apportioned to their respective tracts of lands had been discharged, pleas of *res judicata* were interposed by the landowners. Referring to this answer of the landowners, the Commissioners amended their com-

[3] 92 F. (2d) 783.

plaint and alleged (1) that the State court decrees of 1931 and 1932 were void because certificate holders had not been made parties, and (2) that the certificate holders' judgment against the District and the mandatory injunction decree of the Federal Court were "*res judicata* of all the questions . . . . raised by the" landowners. The trial court decided against the landowners, but the Supreme Court of Arkansas reversed and held that the unappealed Chancery Court decrees in 1931 and 1932 amounted to conclusive adjudications that the particular lands here involved were responsible for no further benefit taxes, thus sustaining the landowners' pleas of *res judicata*.[4]

First. The unappealed 1931 and 1932 Decrees of the Lincoln Chancery Court of the State of Arkansas.

As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is "acknowledged",[5] and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the Chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment.[6] Petitioners also add the contention that the 1932 State court decree was "collusive as a matter of law."

Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors.[7] Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District.[8] And the Commissioners in

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4.— Ark. —.

5 Cf. Protho v. Williams, 147 Ark. 535, 547.

6 Because of this and the further contention that the Supreme Court of Arkansas had denied full faith and credit to the judgments of the Federal District Court, certiorari was granted. — U. S. —.

7 See, e. g., reference to "the board of directors", Acts of Ark. 1909, p. 849.

8 The Act of 1909 set up detailed standards for creation and control of the District; provided for management of District affairs by a Board of Commissioners under outlined supervision by Arkansas Courts; and intrusted the Commissioners with the conduct and control of litigation for the collection and en-

1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of taxes due the District by virtue of drainage benefits received by the particular tracts here in question.

When these certificates were issued, purchasers were charged with notice of and bound by Arkansas statutes in existence when, and pursuant to which, the debt was contracted and which provided for determination of the proportionate liabilities of lands in the District by Chancery proceedings between the Commissioners and landowners with no requirement of notice to creditors of the District.[9] Thus, the very statutory plan from which the certificate obligations sprang contemplated that the Commissioners should represent the collective and corporate interests of the District, in litigation between the District and a landowner involving matters personal to the landowner.

These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue.[10] And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.

It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide. And the Supreme Court of Arkansas points out that under controlling Arkansas law

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forcement of unpaid benefits against lands in the District. Such litigation was required to be conducted in the State Chancery Court having jurisdiction in the County where the particular lands were located; and the lands covered by the 1931-1932 Lincoln Chancery Court decrees were located in Lincoln County. Arkansas Acts 1909, p. 829.

[9] Rees v. City of Watertown, 19 Wall. 107, 120; United States v. County of Macon, 99 U. S. 582, 590.

[10] Elwell v. Fosdick, 134 U. S. 500, 512, 513; Richter v. Jerome, 123 U. S. 233, 246-7.

the Chancery decrees "could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record."[11]

But petitioners nevertheless insist that the State court's chancery decrees cannot avail the landowners because of the subsequent judgments of the Federal District Court.

Second. The Judgments of the Federal District Court.

Petitioners pleaded the final judgments of the Federal District Court as conclusive adjudications of the issues raised by the landowners' defense based upon the Chancery decrees. The refusal of the court below to accept the District Court's judgments as determinative of the individual landowners' liabilities constituted, petitioners claim, a denial of full faith and credit to those Federal judgments. With this contention we do not agree.

In order that the District might be afforded a basis for suits in the State courts to recover taxes with which to pay the judgment against it, the District Court ordered a mandatory injunction requiring County officials to extend on their books drainage taxes against all the lands in the District as a whole, including those here involved. This preliminary to State court suits in which the actual respective liabilities of the individual landowners could be determined was performed, and thereby this provision of the injunction was carried out. The Commissioners were also enjoined to file and prosecute suits in the State courts to collect all such taxes that were delinquent. This was done. Irrespective of whether the District was empowered to represent the landowners when the extension of taxes as a whole was ordered, by its mandatory injunction the District Court did not attempt to foreclose the State court from hearing all matters of personal defense which individual landowners might plead in the suits for collection. Instead, the District Court appropriately left for the State court's determination any such personal defenses available under Arkansas law.[12] And here the Supreme Court of Arkansas has sustained as personal defenses the decrees of payment and discharge obtained by individual landowners in Arkansas Courts of competent jurisdiction. Accordingly, petitioners misconstrue entirely the decree of the District Court in arguing that

[11] — Ark. —, —.

[12] Cf. Arkansas v. St. Louis-San Fran. Ry. Co., 269 U. S. 172, 176; Chandler v. Peketz, 297 U. S. 609, 611.

unless its injunction is carried out without any reference to the prior State court decrees, injunctions by a State court will be permitted to obstruct the execution of a Federal court's judgment.[13] In view of our construction of the mandatory injunction and the fact that its mandates have been fully carried out, it is unnecessary for us to consider the existence or present vitality of the doctrine said to be established by the cases relied upon by petitioners.[14]

The subsantial effect of the District Court's judgments was no more than a determination that a total balance was still due the complaining certificate holders by the District; that drainage taxes sufficient to discharge this balance should be extended on the proper County tax books in accordance with Arkansas law; and that suits against individual landowners be filed for judicial ascertainment of their proportionate shares of the total. Neither the adjudication of the total liability nor the order for extension of drainage taxes on the local tax books was an adjudication of the varying proportionate liabilities of the respective landowners. Determination of these liabilities was properly left for the State court. A decreed total liability for the District was still consistent with the principle that "when the proportion [taxable against a particular tract] is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources."[15]

These landowners were neither served with process nor heard in either the certificate holders' suit against the District or the mandatory injunction proceeding. No relief against them as individuals was either sought or adjudged. The Commissioners did represent all landowners in unsuccessfully defending the certificate holders' suit for an adjudication of the total collective corporate obligation of the District as an entity. In the present suit the landowners have not asserted, and the Supreme Court of Arkansas has not upheld, any attack upon that judgment, which might be valid although uncollectible against the District or any individual landowners.[16] The

[13] Petitioners rely upon Riggs *v.* Johnson County, 6 Wall. 166; United States *v.* Council of Keokuk; *Id.*, 514; The Mayor *v.* Lord, 9 Wall. 409; The Supervisors *v.* Durant, *Id.*, 415; Hawley *v.* Fairbanks, 108 U. S. 543.

[14] But see Erie R. Co. *v.* Tompkins, 304 U. S. 64, 78 and Ruhlin *v.* N. Y. Life Ins. Co., *Id.*, 202, 205.

[15] Rees *v.* City of Watertown, *supra*, 119-20.

[16] Barkley *v.* Levee Comm., 93 U. S. 258, 265-6.

fact that the Commissioners, in the injunction proceedings against the District unsuccessfully attempted to interpose defenses peculiar and personal to the individual landowners cannot foreclose the individual landowners, who were not present, from thereafter pleading a defense otherwise valid. Certainly, the decree in the injunction suit in the Federal court would not prevent an individual property owner from subsequently interposing the defense that his property was not in fact included within the Drainage District.[17] Cognate personal defenses, such as the one that a landowner's proportionate drainage tax liability has been declared by the judgment of a competent tribunal to have been "ascertained and paid", were not foreclosed by the Federal District Court's judgments.

The judgments of the Federal court were not denied full faith and credit by the Supreme Court of Arkansas.

Affirmed.

Mr. Justice McREYNOLDS took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[17] Ocean Beach Heights *v.* Invest. Co., 302 U. S. 614. Cf. Normandy Beach Dev. Co. *v.* United States, 69 F. (2d) 105.